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No. 98-208

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges affirmance of the decision of the court below and thus sup-

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[1] Counsel for the *amicus* authored the brief in its entirety. No person other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

ports the position of the respondent, American Dental Association.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound programs to eliminate employment discrimination. Its membership now includes more than 300 of the nation's largest private sector companies. They all are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), and other laws prohibiting employment discrimination.

Collectively, EEAC's 300-plus member companies make and implement millions of employment decisions each year, including hires, promotions, transfers, terminations, and other employment actions. EEAC members are firmly committed to the principle of equal employment opportunity. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all their employment actions are carried out in accordance with Title VII and other applicable legal requirements. Nevertheless, each employment transaction is a potential subject of one or more charges and/or lawsuits alleging discrimination. Consequently, EEAC members have an ongoing, substantial interest in how the courts interpret the provisions of Title VII, including the provisions for punitive damages added to that law by the Civil Rights Act of 1991. 42 U.S.C. §§ 1981a(a) and 1981a(b)(1).

Because of its members' interests in these issues, EEAC has filed *amicus curiae* briefs with this Court in a number of cases presenting questions concerning the remedies available under equal employment opportunity laws,[2] punitive damages in general,[3] and the meaning of the 1991 amendments to Title VII.[4] Because of its long-standing interest in and familiarity with these issues, EEAC is well situated to brief the Court on the potential implications its decision in this case could have for employers in general.

STATEMENT OF THE CASE

The petitioner, Carole Kolstad, was a staff lawyer for the respondent, American Dental Association. When the second-ranking person in the Association's Washington office announced his retirement, Kolstad expressed interest in the position, but the Association awarded it to a male staff lawyer instead. Kolstad subsequently sued, alleging that the Association had denied her the promotion because of her sex. At trial, she introduced evidence allegedly indicating that the Association's managers never seriously considered her for the position, because they had "preselected" the male lawyer and had altered the content of the position to fit his qualifications. A jury found that the Association had discriminated against Kolstad in violation of Title VII.

The trial court concluded that the evidence was sufficient to support the jury's finding of discrimina-

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[2] *E.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (meaning of "willful" standard for liquidated damages under Age Discrimination in Employment Act); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (same).

[3] *E.g., Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (unconstitutionality of state law prohibiting judicial review of jury awards of punitive damages).

[4] *E.g., Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (non-retroactivity of 1991 amendments).

tion, but not to support an award of punitive damages. Therefore, the trial court awarded Kolstad back pay but did not allow the jury to consider an award of punitive damages. Both parties appealed to the D.C. Circuit.

The appeal was decided initially by a three-judge panel, which held that the 1991 amendments to Title VII gave juries discretion to award punitive damages in almost any case in which they find intentional discrimination, except perhaps where the evidence shows that the defendant employer acted under an honest but mistaken view of what the law requires.

On rehearing, a majority of the court of appeals *en banc* concluded that when Congress amended Title VII in 1991, it "did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII." (Pet. App. 5a.) Rather, the court noted, Congress expressly limited such awards to cases in which a victim of intentional discrimination shows that the unlawful conduct was committed "with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). By using these words, the court reasoned, "Congress meant to reserve punitive damages for particularly egregious violations of Title VII." (Pet. App. at 6a.)

Applying this standard to the case before it, the court of appeals concluded that the evidence did not show "the kind of egregious discriminatory conduct necessary for the imposition of punitive damages." (*Id.* at 20a.) Accordingly, it held that trial court was correct in not allowing the jury to consider such an award.

A minority of the *en banc* court dissented, arguing that by using the phrase "reckless indifference," Congress meant to authorize punitive damages whenever an employer was aware of its obligations under Title VII but engaged in unlawful disparate treatment of employees. The dissenters would recognize exceptions only where the employer was unaware of the law's requirements or "did everything it could to comply" but was unsuccessful. (*Id.* at 29a.)

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that evidence establishing a routine case of unlawful disparate treatment under Title VII, without more, is not sufficient to warrant submitting the question of punitive damages to a jury. The language, structure, and history of the 1991 amendments all support the conclusion that Congress meant to limit the imposition of punitive damages to cases involving a degree of culpability greater than is required to support other Title VII remedies.

The interpretation of the statutory phrase "with malice or with reckless indifference" urged by the dissenters below, and advocated here by the petitioner and her *amici*, would have the anomalous effect of treating employers more leniently when they have managed to remain ignorant of their obligations under Title VII than when they have taken steps to familiarize themselves with the law's requirements. Under the dissenters' reasoning, evidence that an employer had "instituted Title VII compliance programs" or sought advice from "equal employment opportunity consultants and attorneys" could be used against the employer to foreclose any argument that the trial judge should not submit the issue of punitive

damages to the jury. (*Id.* at 28a.) Congress could not have intended such a result when it limited the availability of punitive damages under Title VII to cases involving malice or reckless indifference, for such a reading of the 1991 amendments would conflict with Congress' overarching purpose of encouraging voluntary compliance with Title VII.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT EVIDENCE ESTABLISHING A ROUTINE CASE OF UNLAWFUL DISPARATE TREATMENT, WITHOUT MORE, IS NOT SUFFICIENT TO WARRANT SUBMISSION OF THE QUESTION OF PUNITIVE DAMAGES TO A JURY

A. The Language, Structure, and History of the 1991 Amendments All Support the Conclusion That Congress Meant to Limit the Imposition of Punitive Damages to Cases Involving a Degree of Culpability Greater Than Is Required to Support Other Title VII Remedies

At issue in this case is the meaning of the 1991 amendments to Title VII in which Congress provided that victims of unlawful intentional discrimination may be awarded punitive damages, in addition to any other Title VII remedies to which they may be entitled, if they can show that an employer acted "with malice or with reckless indifference" to their federally protected rights.[5] The court of appeals' opinion sets

[5] 42 U.S.C. Section 1981a(a)(1) provides that in Title VII cases involving unlawful intentional discrimination (*i.e., not* practices that are unlawful because of "disparate impact"), complaining parties under certain circumstances may be awarded compensatory and punitive damages "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]."

42 U.S.C. Section 1981a(b)(1), in turn, limits awards of punitive damages in such cases to instances in which "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

42 U.S.C. Section 1981a(b)(3) caps the total amount of compensatory and punitive damages that a complaining party may be awarded under Section 1981a at from $50,000 to $300,000, depending on how many employees the employer has.

forth a detailed analysis of the language, structure, and history of those amendments, as well as the relevant precedents from this Court and other circuit courts. (Pet. App. 5a-20a.) That analysis demonstrates convincingly that, in conditioning awards of punitive damages upon a showing of "malice" or "reckless indifference," Congress meant to limit such awards to cases involving a significantly greater degree of culpability than is involved in the ordinary case of unlawful disparate treatment.

We need not reiterate in this *amicus* brief the court of appeals' detailed analysis of the 1991 amendments to demonstrate the correctness of its conclusions. We merely highlight a few of its central points, which we believe to be particularly compelling. First, as the court noted, the statutory provisions in question establish a "two-tiered" scheme that sets forth, in separate sections, "one standard for basic liability, another for the exceptional remedy of punitive liability." (Pet. App. 5a.) The use of this basic, two-tiered structure compels the conclusion that Congress intended that juries would consider punitive damages only in cases where a plaintiff has presented "something more"

than just the minimum evidence needed to show intentional discrimination. (*Id.*) Thus, insofar as the dissenters below (*id.* at 24a), and the petitioner and her *amici* here, have suggested that plaintiffs who seek punitive damages need not present any evidence beyond that required to establish liability for unlawful disparate treatment, they are plainly wrong. For, although Congress unquestionably recognized all acts of intentional discrimination as reprehensible, the structure and wording of the amendments make clear that it intended to reserve the remedy of punitive damages for cases involving an extraordinary degree of culpability on the part of an employer.

Second, as the court of appeals went on to observe, in order to avoid flattening, and thereby effectively obliterating, the two-tiered scheme Congress adopted, it is essential that courts treat the second tier—*i.e.*, the "something more" that a plaintiff must show to warrant a jury's consideration of punitive damages—as significantly higher than that of the initial tier, at which liability is established. *See* (Pet. App. 6a.) The second tier would be essentially meaningless if it could be satisfied by so little as a showing that the employer knew that the law prohibits intentional disparate treatment of employees because of race, color, religion, sex, or national origin. Faithfulness to congressional intent precludes this Court from giving section 1981a(b)(1) an interpertation that would render its effect so negligible.

Third, the legislative history and judicial precedents cited by the court of appeals provide ample support for its conclusion that Congress intended to reserve punitive damages for cases involving particularly serious forms of intentional discrimination. Indeed, as the court noted, the legislators who enacted

the 1991 amendments, in describing what they intended the phrase "with malice or with reckless indifference" to mean, repeatedly equated it with the term "egregious" and referred to court decisions using that same term. *See* 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Memo of Sen. Dole *et al.*) (punitive damages to be available only in "extraordinarily egregious cases"); 137 Cong. Rec. S 15483 Oct. 30, 1991) (Sponsors' Interp. Memo) (expressing understanding that punitive damages were awardable only "in egregious cases" under 42 U.S.C. § 1981); H.R. Rep. No. 102-40, pt. 1, at 74 (citing *inter alia Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 484, 489 (6th Cir. 1987), in which Sixth Circuit observed that punitive damages in civil rights actions had "generally have been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant.").

Fourth, the court of appeals' conclusion that Congress meant the phrase "with malice or with reckless indifference" to denote only egregious forms of discrimination also finds ample support in decisions of other circuits, issued both before and since the effective date of the 1991 amendments to Title VII. (Pet. App. 8a-9a.) In addition to the *Beauford* case cited in the House Report referenced above, three other circuit decisions already on the books at the time of the amendments supported the view that punitive damages under 42 U.S.C. Section 1981 were limited to cases involving egregious misconduct. *See Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (evidence of intentional discrimination, although "reprehensible and abhorrent," was inadequate to warrant punitive damages under Section 1981); *Jackson v. Pool Mortg. Co.*, 868 F.2d 1178,

1182 (10th Cir. 1989) (trial court, having found unlawful discrimination under Section 1981, properly rejected punitive damages in absence of showing that defendant exhibited "personal animosity and malice" toward plaintiff), *cert. denied*, 488 U.S. 996 (1988); *Walters v. Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986) (defendants, although responsible for racial discrimination against plantiff, did not act with "requisite ill will or callous disregard of [plaintiff's] federally guaranteed rights" to warrant award of punitive damages under Section 1981). Decisions of several circuits issued under Title VII since the effective date of the 1991 amendments are to the same effect. *E.g.*, *Turic v. Holland Hospitality*, 85 F.3d 1211, 1216 (6th Cir. 1996) (employer's violations of Title VII, although characterized by court as "duplicitous" and indicative of "lack of empathy" toward plaintiff, "did not rise to the level to support a punitive damages award under the Civil Rights Act of 1991); *Lindale v. Tokheim Corp.*, 145 F.3d 953, 958 (7th Cir. 1998) ("In . . . the garden-variety disparate treatment case with no circumstances of aggravation such as the involvement of higher management or a pattern of flouting the law . . . punitive damages may not be awarded.").

Finally, the court of appeals clearly was correct in recognizing that this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), do not undercut its determination that Congress intended to limit punitive damages under Title VII to cases involving egregious forms of intentional discrimination. As the court of appeals pointed out, those decisions involve the standard for liquidated damages under the Age Discrimination in Employment Act

(ADEA), 29 U.S.C. § 621 *et seq.*, not the standard for punitive damages under Title VII. The standard for liquidated damages under the ADEA is whether the employer's violation of the Act was "willful," not whether it was committed with "malice" or "reckless indifference." *See* 29 U.S.C. § 626(b). Moreover, liquidated damages under the ADEA are a fixed amount equal to any back pay awarded to the plaintiff, not a variable amount to be determined by a jury. Accordingly, this Court's holdings that a court may assess liquidated damages under the ADEA if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA," *Thurston*, 469 U.S. at 624, 625; *Biggins*, 507 U.S. at 1709, clearly do not control the meaning of the standard for punitive damages under Title VII. Just because this Court equated the ADEA term "willful" with "reckless disregard," it does not follow that that term has the same meaning as "reckless indifference" under Title VII.

B. In Limiting Punitive Damages to Cases Involving "Malice or Reckless Indifference," Congress Cannot Have Intended That Evidence That an Employer Has Instituted Title VII Compliance Programs or Sought Advice From EEO Consultants or Attorneys Could Be Used Against the Employer as Support for Submitting Punitive Damages Claims to a Jury

Sound public policy does not support a standard requiring automatic submission of punitive damages claims to the jury in every Title VII case in which there is evidence that the employer knew the basic requirements of the law. In this regard, *amicus* EEAC is particularly concerned about the assertion in the dissenting opinion below that:

> Considering that Congress passed the Civil Rights Act over three decades ago, that the statute and

> its prohibition against discrimination are well known to employers, that many companies have instituted Title VII compliance programs, and that an industry of equal employment opportunity consultants and attorneys is readily available to employers in need of assistance, a jury could reasonably conclude that an employer nevertheless refusing to hire or promote a woman because of sex is worthy of punishment.

(Pet. App. 28a.) The clear—and, to us, chilling—implication of this statement is that evidence that an employer has instituted Title VII compliance programs, or has sought advice from equal employment opportunity (EEO) consultants or lawyers regarding its obligations under Title VII, could be used as support for allowing a jury to assess punitive damages against the employer.

The apparent premise of the dissenters' argument is that if an employer has made efforts to familiarize itself with Title VII's requirements, then any violation of those requirements by the employer can be inferred to have been committed "with malice or with reckless indifference" to the law's requirements. In practical terms, such reasoning would mean that most large corporations, such as EEAC's members, would be subject to punitive damages in virtually every case of unlawful disparate treatment. For most such companies do, indeed, maintain active EEO compliance programs and make frequent use of consultants and attorneys to keep them abreast of EEO-law developments. Most also provide regular, ongoing training to ensure that their managerial, supervisory, and in appropriate instances even non-supervisory personnel, are aware of Title VII and other employment-related laws.

The dissenters' arguments would twist Section 1981a(b)(1) into a prescription for penalizing employers who have taken such affirmative steps to familiarize their personnel with Title VII's provisions, while dealing more leniently with those who have managed to remain ignorant of the law and what it requires. But that cannot have been Congress' intent. For one of the overarching aims of Title VII is to encourage employers to cooperate and comply voluntarily with the law's requirements. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974). Clearly, knowledge of those requirements is a prerequisite to such cooperation and voluntary compliance.

Congress' desire that employers become knowledgeable about the statute's requirements is reflected in Section 705(j) of Title VII. That section specifically authorizes and directs the Equal Employment Opportunity Commission (EEOC) to provide education, technical assistance, and training to employers and others regarding Title VII and other laws and regulations enforced by the Commission. *See* 42 U.S.C. § 2000e-4(j).[6] Thus, it would be anomalous, to say the least, if the law were construed in such a way as to subject employers to penalties if they have taken advantage of opportunities to educate themselves and their employees about the law's requirements.

Congress sought to remove any disincentive employers might have to utilize opportunities for assistance and training by the EEOC by expressly provid-

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[6] Section 705(k) provides for a revolving fund, known as the EEOC Education, Technical Assistance, and Training Revolving Fund, to pay the costs of these efforts. 42 U.S.C. § 2000e-4(k).

ing, in Section 705(j)(2), that "[a]n employer . . . shall not be excused from compliance with the requirements of [Title VII] because of any failure to receive technical assistance under this subsection." 42 U.S.C. § 2000e-4(j)(2). The reasoning of the dissenters below, however, would create a disincentive to employers to become knowledgeable about the law. It would suggest to employers that they might be better off not getting assistance and training from the EEOC or from private EEO consultants or attorneys. For, under the dissenters' reasoning, the employer who remained ignorant of the law might be in a better position to resist imposition of punitive damages in the event the employer ever were found to have engaged in some act of unlawful disparate treatment.

These predictable consequences of the dissenters' reasoning are so unpalatable as to make it clear that Congress could not have intended the phrase "reckless indifference" to encompass every act of unlawful disparate treatment committed by an employer who knows the basic requirements of Title VII. Had Congress wanted to make punitive damages awardable in all such cases, it could have made that intention clear. It could, for example, have stated directly that employers would be subject to punitive damages if they committed intentional discrimination with *knowledge* of the federally protected rights of an aggrieved individual. But instead, Congress chose the more limiting phrase "with reckless indifference" to such rights.

"Reckless indifference" connotes a degree of culpability that is not necessarily present in every case in which a defendant knows of the law's basic requirements but still breaches one of them. The word "reckless" reinforces "indifference" and suggests that the character of the violation must be of such a severe,

unusual, or extreme nature as to support an inference that the defendant acted with a conscious and deliberate intent to violate the law, or with a particularly rash or wanton state of mind. The majority of the court of appeals, sitting *en banc*, captured the essence of this meaning in its holding that punitive damages may be imposed in a Title VII case only on a showing of "egregious conduct." We believe this holding accurately reflects the intent of the legislation, supports its overriding goals, and furthers sound public policy.

CONCLUSION

For the reasons stated above, *amicus curiae* EEAC urges this Court to affirm the decision of the court of appeals.

Respectfully submitted,

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